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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1177

DOUBLE EAGLE LUBRICANTS, INC.,
Appellant,

VERSUS

STATE OF TEXAS,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF THE STATE OF TEXAS

STATEMENT AS TO JURISDICTION

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March, 1966

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STATEMENT AS TO JURISDICTION

In compliance with Rules 13 and 15 of this Court, the Double Eagle Lubricants, Inc., Appellants, submit herewith this statement disclosing the basis with which the Supreme Court of the United States has jurisdiction on appeal to review the Final Judgment of the United States District Court for the Northern District of the State of Texas entered herein as set forth above.

OPINION BELOW

The opinion of the specially constituted District Court of three judges is reported in 248 F.Supp., page 515 and made a part hereof by reference.

BASIS OF JURISDICTION

I.

This action was brought by the Appellant against the Appellee to enjoin the State of Texas from interfering with the Appellant in the shipment and sale of its rerefined lubricating oils in the State of Texas on the grounds and for the reason that it was engaged in Interstate Commerce and protected by the Commerce Clause of the Constitution of the United States; and on the further ground that the Federal Trade Commission had assumed jurisdiction and required the labeling of the oil for shipment in Interstate Commerce and thereby preempted the field with reference to the labeling of oil shipped in Interstate Commerce.

II.

The jurisdiction of this Court to review on appeal a final judgment of the District Court is conferred by 28 U.S.C.A., Article 1252.

III.

Cases which sustain the jurisdiction of this Court to review on appeal the final judgment of the District Court are *King* v. *United States*, 344 U.S. 254, 73 S.Ct. 259, 97 L.Ed. 301; *Railroad Commission of Wisconsin* v. *Chicago, B. & Q. R.R. Co.*, 257 U.S. 563, 42 S.Ct. 232, 66 L.Ed. 371, 22 A.L.R. 1086; *Northern Pacific Railway Co.* v. *Montana*, 344 U.S. 905, 73 S.Ct. 329, 97 L.Ed. 699.

QUESTION PRESENTED

The question presented by this appeal is whether the District Court was justified in denying injunctive relief to

protect the Appellant in its Interstate business of transporting its oil into the State of Texas without labeling in accordance with the requirements of Article 1106(b), Vernons Annotated Penal Code of the State of Texas. The Federal Trade Commission had authority under 15 U.S.C.A. 45(a) to require labeling and it had so done but the United States District Court, required labeling in accordance with the Texas Statute, *supra*, in addition to the labeling as required by the Federal Trade Commission.

STATEMENT OF THE CASE

In this appeal from the final judgment of a specially constituted United States District Court of three judges, the record shows that the Double Eagle Lubricants, Inc., was engaged in rerefining previously used motor oil and that it was an Oklahoma Corporation, and transported and sold its oil in various states, including Texas; and that the Federal Trade Commission required it to label its oil by placing on the label letters showing the oil "Rerefined From Previously Used Oil." This was done, and the label was approved by the Federal Trade Commission. Later, the Federal Trade Commission decided that it would require the label placed on the same side or part of the can as the trade name Double Eagle appeared, which would, in effect, destroy the label. After a hearing before the Federal Trade Commission in Oklahoma City, the Trial Examiner dismissed the complaint of the Federal Trade Commission, holding that the label was amply sufficient and that the Federal Trade Commission could not and should not change its previous approval; and that the Double Eagle Lubri-

cants should not be required to do more than it had done in the labeling of its products.

An appeal was had by the Federal Trade Commission to the Federal Trade Commission; the matter submitted and argued in Washington, and the Federal Trade Commission said, in effect, that it would determine the matter not upon the evidence, but upon its examination of the cans or containers, and it set aside the order of the Federal Trade Commission's Hearing Examiner and required the labels to be placed on the part of the can containing the trade name and insignia of the Double Eagle which, in effect, destroyed the trade name and brand.

An appeal was had to the United States Court of Appeals for the Tenth Circuit, the case briefed and argued, and the Federal Trade Commission was affirmed, or its order was affirmed, and the matter is now pending on a Petition for Rehearing before the Court of Appeals Tenth Circuit.

The State of Texas requires more than the Federal Trade Commission required in that it required the labeling on the front and back panels of the can to be large lettering with the words "Reconditioned Motor Oil."

The United States District Court held that the State of Texas could make this requirement which would, in effect, destroy the Appellant's Interstate delivery of oil by reason of the fact that there would then be three labels on each can of motor oil, and the Appellant could not comply with both the Federal Trade Commission's requirement and the requirements of the State of Texas.

THE QUESTION PRESENTED IS SUBSTANTIAL

In the case at bar, if the judgment of the United States District Court is sustained, it means that the Appellant could not transport oil in Interstate Commerce because it is impossible to label the oil in accordance with the Federal Trade Commission's requirement and the requirements of the several states. Either the Federal Trade Commission had jurisdiction or the State of Texas had jurisdiction, and the Appellant could not comply with both.

a.

The Appellant shows that the District Court failed to properly apply the United States Constitution and failed to give proper consideration to the preemption, by virtue of the acts and jurisdiction of the Federal Trade Commission.

The question presented here is very substantial, in that it affects the operation of the Appellant in Interstate Commerce in the states adjacent to and surrounding the domicile of the Appellant; and, in effect, prevents the Appellant from exercising its constitutional rights to engage in Interstate Commerce.

b.

The District Court decided that the Appellant could, when it shipped oil to Texas, place on the can three labels, namely two, in accordance with the Texas Law and one, in accordance with the ruling of the Federal Trade Commission, although it was shown that the cans must be ordered far in advance in order that they may be properly

processed and lithographed, and that the label cannot be changed after the can is manufactured.

A similar case by this same Appellant was before the United States District Court of the State of New Mexico. A three-judge Court was convened composed of Judge Pickett, the late Judge Sam Bratton, United States Circuit Judge, and the late Judge Hatch, United States District Judge, and that Court enjoined the State of New Mexico from interfering with the Appellant in its sale and disposition of oil in New Mexico and it was based squarely on the same set of facts as are herein involved.

The case was not officially reported, but a copy of the opinion in this case was filed in the United States District Court for the Northern District of Texas.

CONCLUSION

The Appellant respectfully shows that this case presents for review a substantial question for the consideration of this Court, and one of great importance for the reason that it should be determined whether the State or the Federal Government must determine what kind of labeling is required for motor oil shipped in Interstate Commerce.

Respectfully submitted,

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Attorney for Appellant

March, 1966

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APPENDIX TO STATEMENT AS TO JURISDICTION

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DOUBLE-EAGLE LUBRICANTS, INC., a corporation	)	Civil Action
v.	)	3-995
THE STATE OF TEXAS	)	

Before BROWN, Circuit Judge, and DAVIDSON, and HUGHES, District Judges

OPINION

District Judge Hughes. This suit was brought by Double-Eagle Lubricants, Inc., an Oklahoma corporation, against the State of Texas seeking a declaratory judgment and

injunction against the enforcement of Article 1106(b) Vernon's Annotated Penal Code of Texas.

Double-Eagle is in the business of purchasing previously used oil (crank case drainings) which it refines and then sells to dealers for resale to the public.

Article 1106(b) Vernon's Annotated Code of Texas[1] provides that all re-refined or re-processed oil that is sold in the State of Texas be labeled "Reconditioned Motor Oil," and such label shall appear "on the front and back surfaces of the container when displayed to the public in sale displays."

Section 5(a) of the Federal Trade Commission Act, 66 Stat. 632, 15 U.S.C. 45(a)[2], empowers and directs the Federal Trade Commission to prevent persons, partnerships or corporations . . . from using . . . unfair or deceptive acts or practices in commerce.

---

[1] Article 1106.

"(B) No person, firm, association of persons or corporation shall sell or offer for sale as lubricating oil, any oil that has been rerun, refiltered, reclaimed or refined from crank case draining or any other oil that has been theretofore used for purposes of lubrication, unless the said oil is sold as and labeled 'Reconditioned Motor Oil.' The words 'Reconditioned Motor Oil' shall be plainly and legibly printed on each container, which said lettering shall be imprinted in two (2) places on the container or label in a manner that said lettering will appear both on the front and back surface of the container when displayed to the public in sale displays, and which said lettering shall be in letters of not less than three-sixteenths (3/16) of an inch in height and not less than one-sixteenth (1/16) of an inch in the width of each line used to form said letters."

[2] The pertinent provisions of Section 5(a) are as follows:

"5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

"5(a)(6) The Commission is empowered and directed to prevent persons, partnerships or corporations . . . from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce."

Under the authority of this statute the Commission promulgated a rule relating to "Deceptive Advertising and Labeling of Previously Used Lubricating Oil," 16 C.F.R. 406.1, 406.3, 406.5(b)(2) (Supp. 1965)[3], which concluded that it is an unfair and deceptive act or practice to fail to disclose on the front panel of the container the fact that a lubricating oil has been made from previously used oil.

Double-Eagle Lubricants, Inc., was directed by the Commission to comply with this rule and upon its refusal, a proceeding was brought against the corporation and its officers, individually. The final order of the Commission, dated October 22, 1964, directed the corporation and its officers in connection with their offering for sale of lubricating oil in commerce to forthwith cease and desist from, *inter alia*:

> "1. Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been reclaimed or in any manner processed from previously used oil, without disclosing such prior use to the purchaser or potential purchaser

---

3. The pertinent provision of the rule is as follows:

"Section 406.5(b) Accordingly, for the purpose of preventing such unlawful practices, the Commission hereby promulgates, as a Trade Regulation Rule, its conclusions and determination that in connection with the sale or offering for sale of lubricating oil composed in whole or in part of previously used lubricating oil, in commerce, as "commerce" is defined in the Federal Trade Commission Act, it constitutes an unfair method of competition and an unfair and deceptive act or practice to:

* * * * * * *

"(2) Fail to disclose clearly and conspicuously that such used lubricating oil has been previously used, in all advertising, sales promotional material and on each front or face panel of the container. For the purpose of this Part 406 the front or face panel means the part (or parts) of the container on which the brand name is usually featured and which is customarily exposed to the view of prospective purchasers when displayed at point of retail sales; . . ."

in the advertising and sale promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container."

A petition to review and set aside this order, filed by Double-Eagle, was denied by the United States Court of Appeals for the Tenth Circuit on November 15, 1965. *Double-Eagle Lubricants, Inc.* v. *Federal Trade Commission,* No. 7958.

In determining whether an injunction should be issued against the enforcement of Article 1106(b), Vernon's Annotated Penal Code of Texas, the first question presented is whether the Federal Government has preempted the regulation of interstate commerce among the several states so as to invalidate the Texas statute.

In the area of federal-state jurisdiction covering the same subject matter, by virtue of the supremacy clause of the United States Constitution, it is clear that federal law is paramount if Congress has clearly indicated an intention to preempt the field. On the other hand, before a federal statute or administrative order will be deemed to have preempted a valid state safety regulation, Congress must clearly have manifested such intention.

In *Retail Clerks International Association* v. *Schermerhorn,* 375 U.S. 96 (1963), the Supreme Court stated at page 103,

> ". . . The purpose of Congress is the ultimate touchstone Congress under the commerce clause, may displace state power . . . or it may even, by silence indicate a purpose to let state regulation be imposed on the federal regime."

In *Head* v. *New Mexico Board of Examiners,* 374 U.S. 424 (1963), appellants, newspaper owners and a radio corporation, had been enjoined from accepting or publishing within the State of New Mexico a Texas optometrist's ad-

vertisement found to be in violation of New Mexico law. It was claimed by appellant-radio corporation that regulation of advertising by radio had been preempted by the Communications Act of 1934. In overruling this contention the Supreme Court stated at page 431:

> "The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'"

The Court also noted as significant that "the Commission itself has apparently viewed state regulation of advertising as complementing its regulatory function, rather than in any way conflicting with it."

Again in *Florida Lime and Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132 (1963), the Supreme Court upheld a California statute which prohibited the transportation or sale in California of avocados containing less than 8 per cent of oil, by weight . . . excluding the skin and seed, and which had resulted in exclusion from California markets of certain Florida avocados. The Court stated at page 146 that the settled mandate governing the inquiry as to whether Congress has ordained that State regulation shall yield "is not to decree such a federal displacement 'unless that was the clear and manifest purpose of Congress,' Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230."

Double-Eagle brings to our attention the case of *Campbell* v. *Hussey,* 368 U.S. 297 (1961), as authority for its contention that Congress has preempted the field of labeling commodities to the exclusion of the states. That case, however, involved tobacco which is regulated under a different statute from the one involved herein. In its opinion the

Supreme Court noted at page 301 that Section 2 of the Tobacco Inspection Act, 49 Stat. 731, 7 U.S.C. 511(a), stated that " 'uniform standards of classification and inspection' are 'imperative for the protection of producers and others engaged in commerce and the public interest therein.' "

No such clear statement of Congressional intent of uniform federal standards is found in the Federal Trade Commission Act. Neither in its text nor in its legislative history is there anything to indicate an intention by the Congress to confer exclusive jurisdiction on the Federal Trade Commission. Therefore, state laws providing for regulation of unfair or deceptive practices in commerce are valid unless they conflict with the federal law to the extent that both cannot stand in the same area.

An examination of Article 1106(b) Vernon's Annotated Penal Code shows clearly that it is not in conflict with Section 5(a)(1) of the Federal Trade Commission Act. The purpose of both is the same and they are mutually consistent. The Texas statute was passed to prevent deception of the public as to the nature of the product sold. The Federal Trade Commission Act was enacted to prevent unfair or deceptive acts or practices in interstate commerce.

As applied to Double-Eagle, the Commission's order requires Double-Eagle to make a disclosure on the front panel or front panels of its containers of the fact that its contents have been made from used oil.

The Texas statute requires that both the front and back of such containers bear the phrase "Reconditioned Motor Oil." Clearly compliance with the Texas statutes does not result in conflict with Federal requirements.

In the case of *Royal Oil Corporation* v. *Federal Trade Commission*, 262 F.2d 741 (1959), a similar question was before the United States Court of Appeals for the Fourth Circuit. There the Court had before it an alleged conflict between a North Carolina statute and a Federal Trade

Commission order as in this case. The distinction between the two cases is that in *Royal Oil*, the appellant contended that because of the conflict in Federal and state law, state law should control. In holding that there was no conflict between the Federal Trade Commission order and the state statute, the Fourth Circuit stated at page 743:

> "However, we think that the order of the Commission in this case does not in reality conflict with the North Carolina law. The state statute does not prohibit the use of additional descriptive words, and the Commission has indicated that it is not the use of the word 'reprocessed' which it considers deceptive, but rather the failure to make the additional specific disclosures that the re-processed oil had been previously used. The order is clearly not in conflict with the state's requirement, and the petitioner can readily comply with both."

From this holding, it is clear that no conflict exists in the intent and purpose of or phraseology required by the Federal Trade Commission order and the Texas statute, and that Double-Eagle can comply with both.

The last question to be considered is whether Article 1106(b) Vernon's Annotated Penal Code as applied to Double-Eagle is unconstitutional by virtue of the Commerce Clause of the United States Constitution.

In *Head* v. *New Mexico Board of Examiners, supra,* in holding that the New Mexico statute involved did not constitute an undue burden on interstate commerce, the Supreme Court stated at page 427:

> "Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in Huron Portland

[APPENDIX]

Cement Co. v. City of Detroit, 362 U.S. 440, 4 L.ed2d 852, 80 S. Ct. 813, 78 ALR 2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: 'In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulations of Commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and all safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution. "' "

In *Savage* v. *Jones,* 225 U.S. 501 (1912), there was involved the validity of an Indiana statute regulating the sale of concentrated commercial feed for animals and providing for the affixing of labels and stamps on the packages as evidence of the guarantee and inspection thereof. In holding that the Act did not constitute an unwarranted interference with interstate commerce, the Supreme Court stated on page 524:

"The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food . . . when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation

enacted by Congress pursuant to its constitutional authority."

Since the purpose of the Texas statute in requiring reconditioned motor oil to be labeled as such is to protect the safety and property of the public and to prevent a deception as to the nature and quality of the product the statute is within the police power of the State. While the law incidentally affects interstate commerce, it does not discriminate against such commerce and is reasonable in its requirements.

It is clear that Article 1106(b) Vernon's Annotated Penal Code is a valid exercise of the state's police power, and since the Federal government has not preempted the field to the exclusion of the states, the Texas statute is valid as applied to Double-Eagle.

Since the oral argument of this case was heard, the Supreme Court rendered its decision in *Swift & Company, Inc.* v. *Wickham*, 382 U.S. —, 34 U.S.L. Week 4024 (Nov. 22, 1965). It held in that case that 28 U.S.C. Sec. 2281 does not require that a three-judge court be convened to hear an application to enjoin enforcement of a state statute because of alleged congressional preemption of the field to the exclusion of the states. In reaching this conclusion, the Supreme Court expressly overruled a three year old contrary decision in *Kesler* v. *Department of Public Safety*, 369 U.S. 153 (1962). 34 U.S.L. Week at 4026. The Court further held that a claim that a state labeling regulation is repugnant to the Commerce Clause is "too insubstantial to support the jurisdiction of a three-judge court." 34 U.S.L. Week at 4025.

In the absence of a determination by the Supreme Court whether its new construction of Section 2281 is to be applied retroactively, I hereby certify that, as the district judge to whom this case was originally assigned, I have individually arrived at the same conclusions as those con-

tained in this opinion written in behalf of the panel. See 34 U.S.L. Week at 4025 n. 4 and *Query* v. *United States*, 316 U.S. 486 (1942).

The application for an injunction against enforcement of the statute is denied.

United States Circuit Judge

United States District Judge

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

DOUBLE-EAGLE LUBRICANTS	(	
v	(	Civil Action No. 3-995
STATE OF TEXAS	(	

The Court having on _____ day of December, 1965, filed its opinion, including its findings of fact and conclusions of law, now, in accordance therewith, it is

Ordered, Adjudged and Decreed that the amended complaint herein be and the same is hereby dismissed on the merits, with taxable costs allowed defendants.

This the 10 day of December, 1965.

United States Circuit Judge

United States District Judge

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

)OUBLE-EAGLE LUBRICANTS, INC.,
a corporation

v. Civil Action 3-995

'HE STATE OF TEXAS

ORDER OVERRULING PLAINTIFF'S
MOTION FOR NEW TRIAL

The plaintiff, having filed a motion for a new trial and memorandum brief in support thereof; and the Court eing fully advised of the premises contained therein and aving duly considered the same;

It is therefore ORDERED, ADJUDGED and DECREED iat the motion of the plaintiff be, and the same is, hereby verruled.

Entered this 25 day of January, 1966.

/s/ John R. Brown
United States Circuit Judge

/s/ Whitfield Davidson
United States District Judge

/s/ Sarah T. Hughes
United States District Judge

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October Term, 1965

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Appellant

v.

THE STATE OF TEXAS
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO DISMISS AND/OR AFFIRM

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STATUTES

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16 C.F.R. 406.1, 406.3, 406.5(b)(2), Federal Trade Commission Rules 3, 10

NO. 1177

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

DOUBLE EAGLE LUBRICANTS, INC.,
Appellant

v.

THE STATE OF TEXAS
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS

MOTION TO DISMISS AND/OR AFFIRM

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

OPENING STATEMENT

Appellee in the above entitled and numbered case moves to dismiss and/or affirm on the grounds that this Court does not have jurisdiction of the appeal and that the questions presented are too insubstantial to warrant further argument before this Court.

OPINION BELOW

The opinion of the District Court for the Northern District of Texas, Dallas Division, acting both in a

three-judge and single-judge capacity, is reported at 248 F. Supp. 515 (1965) (page 1, Appendix to Appellant's Jurisdictional Statement).

JURISDICTION

Jurisdiction of this Honorable Court to review this appeal is not conferred by 28 U.S.C. Sec. 1252, as the constitutionality of an Act of Congress has not been questioned. Neither does this Honorable Court have jurisdiction of this appeal under 28 U.S.C. Sec. 1253, as the questions presented did not require adjudication by a District Court composed of three-judges in accordance with 28 U.S.C. Sec. 2281 (1964 ed.).

QUESTIONS PRESENTED

I.

WHETHER THIS COURT HAS JURISDICTION OF A DIRECT APPEAL FROM THE UNITED STATES DISTRICT COURT WHICH DENIED THE APPELLANT'S REQUEST FOR AN INJUNCTION AGAINST THE ENFORCEMENT OF A STATE LABELING STATUTE BASED UPON THE CONTENTION THAT THE STATE LAW HAD BEEN PRE-EMPTED BY FEDERAL LAW AND, IN THE ALTERNATIVE, WHETHER THE CONTENTION IS TOO INSUBSTANTIAL TO WARRANT FURTHER ARGUMENT BEFORE THIS COURT.

II.

WHETHER THE APPELLANT'S CONTENTION THAT A TEXAS STATUTE,

WHICH REQUIRES THAT RECONDITIONED MOTOR OIL BE LABELED AS SUCH IN ORDER TO PROTECT THE SAFETY AND PROPERTY OF THE PUBLIC AND TO PREVENT A DECEPTION OF THE PUBLIC AS TO THE NATURE AND QUALITY OF THE PRODUCT, CONSTITUTES AN UNDUE BURDEN ON COMMERCE IS TOO INSUBSTANTIAL TO SUPPORT THE JURISDICTION OF A THREE-JUDGE COURT AND, IN THE ALTERNATIVE, TO WARRANT FURTHER ARGUMENT BEFORE THIS COURT.

STATUTES INVOLVED

The primary statute involved is Texas Penal Code (Vernon 1948) Article 1106(b). Also involved with reference to the question of federal pre-emption are Sections 5(a)(1), 66 Statutes 632, 15 U.S.C. 45(a)(1); Section 5(g), 52 Statutes 111, 15 U.S.C. 45(g), of the Federal Trade Commission Act and the Federal Trade Commission's Rules 16 C.F.R. 406, 16 C.F.R. 406.1, 406.3, 406.5(b)(2).

STATEMENT OF THE CASE

This is a direct appeal from the final judgment and decree entered on December 10, 1965, by the United States District Court for the Northern District of Texas which was composed of three judges specifically constituted pursuant to 28 U.S.C. Section 2281. The Court dismissed the Appellant's complaint which sought a declaratory judgment and injunction against the enforcement by the Appellee of Article 1106(b).

The Appellant, an Oklahoma corporation, is engaged in the business of purchasing previously used oil (crankcase drainings) from gasoline service stations and other sources which it subjects to certain re-refining processes and then sells the oil to dealers for resale to the public.

Article 1106(b), provides that all re-refined or re-processed oil sold in Texas be labeled "Reconditioned Motor Oil" in the manner specified in the statute.

The Appellant alleged as grounds for its cause of action that the state statute had been pre-empted by a Decision and Order of the Federal Trade Commission and the state law constituted an undue burden on commerce.

In accordance with the District Court's pre-trial Order, all facts were stipulated by the Appellant and Appellee. Subsequent to the stipulations being filed with the District Court, the Appellee filed a Motion to Withdraw Paragraph Five of the stipulations based upon the Appellee being informed by the Federal Trade Commission that the Appellant was not in compliance with the labeling requirements of the Federal Trade Commission and the letter which purported to approve the labels used by the Appellant, which was included in Paragraph Five, had been withdrawn by the Commission. The District Court entered an Order granting the Appellee's Motion on October 12, 1965. Thereafter, the Court on its own Motion entered an Order finding that the Appellant was not in compliance with the Order of the Federal Trade Commission.

The case was heard by the District Court on November 5, 1965, with no further evidence being introduced by either party.

On December 10, 1965, the District Court entered its Opinion and Judgment dismissing the Appellant's complaint and held that the Texas law had not been pre-empted by the Federal Trade Commission Act or any order or decision of the Federal Trade Commission and that Article 1106(b) was a legitimate exercise of the State's police power and did not violate the commerce clause of the United States Constitution. Judge Hughes, in her opinion, discussed this Court's decision in *Swift and Company, Inc. v. Wickham,* 382 U.S. 111, 86 S. Ct. 258, 15 L. Ed. 2d 194 (1965), which was decided after oral argument in the instant case. Judge Hughes, in the absence of a determination by this Court whether the interpretation of 28 U.S.C. Section 2281 (1964 ed.) in the *Swift* case was to be applied retroactively, certified that as the District Judge to whom this case was originally assigned, she had individually arrived at the same conclusions as those contained in the opinion written on behalf of the panel. Thus, the District Court, in dismissing the suit on the merits, acted both in a three-judge and single-judge capacity.

ARGUMENT

I.

A. THE CONTENTION THAT THE TEXAS LAW HAS BEEN PRE-EMPTED BY FEDERAL LAW WILL NOT SUPPORT JURISDICTION OF A DIRECT APPEAL TO THIS COURT.

Whether or not this Court has jurisdiction of the Appellant's direct appeal under 28 U.S.C. Section 1253, depends on whether the three-judge Court was

required to hear and determine the Appellant's action to enjoin the enforcement of Article 1106(b). The threshold question presented is whether a three-judge court was required to adjudicate the Appellant's contention that the Texas statute had been pre-empted by Federal law.

Discussed below is the question of whether the Appellant's contention that the Texas labeling requirement constitutes an undue burden on commerce presents a substantial federal question which would require the case to be heard by a three-judge court.

In view of this Court's decision in *Kesler v. Department of Public Safety,* 369 U.S. 153, 82 S. Ct. 807, 7 L. Ed. 2d 641 (1962), the State originally requested that the District Court composed of three judges be empaneled in accordance with the provisions of 28 U.S.C. Section 2281 (1964 ed.). As stated above, subsequent to oral argument but before the District Court's opinion and judgment in the instant case was entered, this Court rendered its decision in *Swift and Company v. Wickham,* 382 U.S. 111, (supra), specifically overruling the *Kesler* doctrine and holding that a three-judge court is not required to hear a claim involving Federal pre-emption. See also *Brotherhood of Locomotive Engineers et al. v. Chicago, Rock Island & Pacific Railroad Co.;* 382 U.S. 423, 15 L. Ed. 2d 501, 86 S. Ct. 594 (1966). In light of this decision and because of the uncertainty of the decision being applied retroactively, the District Court acted in both a three-judge and single-judge capacity.

In *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Company,* —— U.S. ——, 15 L. Ed. 2d 324, 86 S. Ct. 423, (1965), it was again held that

this Court did not have jurisdiction of a direct appeal from a three-judge District Court which issued an injunction against the enforcement of an order of the Pennsylvania Utilities Commission "based on incompatibility between the State order and the Federal statute." This case, in which a direct appeal had been taken before the *Swift* case was decided, clearly resolves the uncertainty which faced the District Court and, in effect, rendered the judgment on behalf of the three-judge panel superfluous to that entered by Judge Hughes acting in the capacity of the single judge to whom the case was originally assigned.

It is further respectfully submitted that due to the action of the District Court in a single-judge capacity there is no necessity that the judgment in the instant case be vacated in order that a new decree be entered from which a timely appeal may be taken to the Court of Appeals as was done in *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Company,* 86 S. Ct. 423, (supra). This Court's decisions in *Swift* and *Pennsylvania Public Utility Commission* were decided long before the Appellant's Motion for New Trial was overruled by the District Court and before the time for taking an appeal began to run. Also, in *Swift* the District Court acted in both a three-judge and single-judge capacity and the Appellant therein lodged an appeal in the Court of Appeals from the single-judge determination. Further, the discussion of *Swift and Company v. Wickham,* 382 U.S. 111, (supra), in the opinion of the District Court below clearly provided the Appellant ample notice and opportunity to file an appeal in the United States Court of Appeals for the Fifth Circuit within the time allowed.

B. THE FEDERAL PRE-EMPTION QUESTION PRESENTED IS TOO INSUBSTANTIAL TO WARRANT FURTHER ARGUMENT BEFORE THIS COURT.

The District Court's holding that Article 1106(b) has not been pre-empted by federal law is plainly correct.

The Court's finding, consistent with numerous decisions of this Court, that no conflict existed in the state and federal requirements and that the Congress and the Federal Trade Commission had expressed no intent to pre-empt state laws of this nature, completely forecloses any doubt as to the invalidity of the Appellant's contention.

In the District Court, the Appellant alleged that it had been ordered by the Federal Trade Commission in *The Matter of Frank A. Kerran, et al.*, 54 F.T.C. 1035 (1958), affirmed 265 F. 2d 246 (10th Cir. 1959), cert. den. 361 U.S. 818 (1959), to place labels on containers of motor oil showing that the oil contained therein was processed from previously used oil. It was further alleged that the labels now being used by the Appellant had been approved by the Federal Trade Commission and conformed to all requirements of the Commission. Therefore, the Appellant contended that the Federal Trade Commission Order had pre-empted the right of the State to enforce Article 1106(b).

Contrary to the Appellant's allegation, at the present time its labels have not been approved by the Federal Trade Commission nor do they meet the requirements of the Commission. This is clearly shown by examination of the documents of the Federal Trade Commis-

sion which are contained as Exhibit I of the Appellee's Motion to Withdraw Stipulations, which is a part of the record of this case (R. 35). These documents of the Commission are public records of which this Court may take judicial notice and the Appellee respectfully moves the Court to take judicial notice of these documents. *Milwaukee Mechanics Insurance Co. v. Oliver,* 139 F. 2d 405, 407 n. 2 (5th Cir. 1944); *Colonial Airlines v. James,* 202 F. 2d 914, 919 n. 4 (2nd Cir. 1953); *Fletcher v. Jones,* 105 F. 2d 58, 61-62 (D.C. Cir. 1939), cert. den. 308 U.S. 555; *Interstate Natural Gas Co. v. Southern California Gas Co.,* 209 F. 2d 380, 385 (9th Cir. 1953).

These documents clearly show that the labels now being used by the Appellant had been approved by the Federal Trade Commission but this approval was later revoked and at the present time the labels do not comply with the Federal Trade Commission requirements.[1] Further, the Appellant herein was not incorporated until after the Federal Trade Commission's decision was rendered in *Frank A. Kerran, et al.,* 54 F.T.C. 1035 (1958), and was not a party to that proceeding.[2]

The first time the Appellant herein was involved in a proceeding before the Federal Trade Commission was in *Double Eagle Lubricants, Inc., et al.,* Docket No. 8589, decided October 22, 1964. In this case, the Federal Trade Commission found that the labels now being used by Appellant violated Section 5(a)(1) of the Federal Trade Commission Act, 15 U.S.C. 45(a)(1), and do not comply with the Commission's Trade Reg-

[1]See Exhibit 1 attached to Defendant's Motion to Withdraw Stipulation (R. 35).

[2]See Exhibit 2 attached to Defendant's Motion to Withdraw Stipulation (R. 35).

ulation Rules relating to "Deceptive Advertising and Labeling of Previously Used Lubricating Oil," 16 C.F.R. 406.1, 406.3, 406.5(b)(2). The Appellant's petition to review this order in the United States Court of Appeals for the Tenth Circuit was denied on November 15, 1965, and is now pending before that Court on a petition for rehearing. *Double-Eagle Lubricants, Inc. v. Federal Trade Commission,* —— F. 2d ——.

In the area of interacting Federal-State jurisdiction covering the same subject matter, by virtue of the supremacy clause of the United States Constitution, federal law is paramount and state laws that are in conflict therewith, or which operate in an area which Congress has clearly indicated an intention to pre-empt the field must yield to the Federal authority. Certainly, we do not question this principle.

This Court has stated many times that state laws, especially those enacted pursuant to the state's inherent police power, will be invalidated by the federal authority only when (1) the state law conflicts with the federal law to the extent that both cannot stand in the same area, or (2) where Congress clearly manifests an intention to pre-empt the field.

Clearly, as found by the District Court, no conflict exists in the requirements of the state law and the Federal Trade Commission's Order or the Commission's Trade Regulation Rules. Article 1106(b) was passed by the Legislature of this State as a safety regulation and to prevent deception of the public as to the nature of the product being sold. The Federal Trade Commission Act was passed to prevent unfair and deceptive acts or practices in interstate commerce.

Thus, it is clear that the two statutes have the same intent and purpose and are mutually consistent.

The Federal Trade Commission in *Double-Eagle Lubricants, Inc., et al.,* Docket No. 8589, (1964), in finding that the Appellant's present labeling of its containers of previously used oil violates the Federal Trade Commission Act and does not comply with the standards of the Commission's Trade Regulation Rules relating to "Deceptive Advertising and Labeling of Previously Used Lubricating Oil," by its Final Order directed the Appellant to cease and desist from:

> "1. Advertising, offering for sale or selling, any lubricating oil which is composed in whole or in part of oil which has been re-cleaned or in any manner processed from previously used oil, without disclosing that such prior use to the purchaser or potential purchaser in the advertising and sales promotion material, and by a clear and conspicuous statement to that effect on the front panel or front panels on the container."
>
> "2. Representing in any manner that lubricating oil composed in whole or in part of oil that has been manufactured, reprocessed or re-refined from oil that has been previously used for lubricating purposes has been manufactured from oil that has not been previously used."

This Order is general in its terms and all that is required is that the Appellant disclose on the front panel of its containers that the contents are made from previously used oil. It does not specify either the manner of the disclosure or any "magic words" to be used. More importantly, it does not prohibit the use of additional words or phrases which also identify the contents of the product. Neither does the Texas statute,

which requires that both the front and back panel of the container be labeled "Reconditioned Motor Oil," prohibit the use of additional words or phrases that would further disclose the nature of the motor oil. Nor does the Federal or State law prescribe the size or type of lettering which would preclude the use of an additional disclosure. Indeed, as stated by the District Court, and contrary to the contention of the Appellant in its Jurisdictional Statement, because of the almost exact similarity in the requirements of both the Federal and State law, the Appellant can easily fashion its labels in a manner that would comply with both. In fact, a single label that would comply with both requirements was submitted by the Federal Trade Commission in its brief as amicus curiae to the District Court.

The United States Court of Appeals for the Fourth Circuit had before it the identical question presented in the instant case in *Royal Oil Corporation v. Federal Trade Commission,* 262 F. 2d 741 (1959). In this case, the Court was faced with the question of an alleged conflict between the North Carolina statute, which is very similar to the Texas statute, and an Order of the Federal Trade Commission, substantially identical to the Order under consideration herein. The only distinction in the *Royal Oil* case and in the instant case is that it was argued that because of the conflict in Federal and State law, State law should control. The Court in holding that there was no conflict in the Federal Trade Commission Order and the State statute stated on page 743:

> "However, we think that the Order of the Commission in this case does not in reality conflict with the North Carolina law. The state statute

does not prohibit the use of additional descriptive words, and the Commission has indicated that it is not the use of the word 'reprocessed' which it considers deceptive, but rather the failure to make the additional specific disclosures that the reprocessed oil had been previously used. The order is clearly not in conflict with the state's requirement, *and the petitioner can readily comply with both.*" (Emphasis added)

The holding in the *Royal Oil* case establishes beyond preventure that no conflict exists in the intent and purpose of, or phraseology required by the Federal Trade Commission Order and the Texas statute, and the Appellant can readily comply with both.

The valid exercise by the State of its inherent police power is not superceded by the mere entrance into the same field of regulation by the Federal Government, unless there exists a conflict in the two Acts. Thus, the Appellant's contention to the District Court that the State is now powerless to regulate previously used oil sold in Texas due to "the fact that when the federal government exercised its power to regulate a commodity in interstate commerce, the state legislation then becomes inoperative and the federal legislation exclusive in its application" ignores the test applied many times by this Court.

In *Kelly v. Washington,* 302 U.S. 1, 82 L. Ed. 3, 58 S. Ct. 87 (1937), this Court stated the principles to be applied in cases of this nature. Pages 9-10.

"Under our constitutional system, there necessarily remains to the States, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction although interstate commerce may be effected. . . .

> The principle is thoroughly established that the exercise by the State of its police power, which would be valid if not superceded by Federal action, is superceded only where the repugnance or conflict is so 'direct and positive' that the two acts cannot 'be reconciled or consistently stand together.' . . ."

See also *Brotherhood of Locomotive Engineers et al. v. Chicago, Rock Island & Pacific Railroad Co.*, 382 U.S. 423, 15 L. Ed. 2d 501, 86 S. Ct. 594 (1966); *Head v. New Mexico Board of Examiners in Optometry*, 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963); *Colorado Anti-Discrimination Commission v. Continental Airlines, Inc.*, 372 U.S. 714, 83 S. Ct. 1022, 10 L. Ed. 2d 83 (1963); *Buck v. California*, 343 U.S. 99, 96 L. Ed. 775, 72 S. Ct. 502 (1951); *Southern Pacific Company v. Arizona*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1944).

The District Court's holding that neither the Congress nor the Federal Trade Commission has manifested any intention to pre-empt the State law is equally clearly correct. The established principle stated many times by this Court, as well as other courts, is that before a federal statute or administrative order will be deemed to have pre-empted a valid state safety regulation, Congress must have clearly manifested such an intention. In relation to this principle, the District Court correctly found that "no such clear statement of Congressional intent of uniform Federal standards is found in the Federal Trade Commission Act. Neither its text or its legislative history is there anything to indicate an intention by the Congress to confer exclusive jurisdiction on the Federal Trade Commission."

In *Retail Clerks International Association, Local*

1625, AFL-CIO v. Schermerhorn, 375 U.S. 96, 11 L. Ed. 2d 179, 84 S. Ct. 219 (1963), this Court stated at page 103:

> "... *The purpose of Congress is the ultimate touchstone.* Congress under the commerce clause, may displace state power (Citations Omitted) or it may even, by silence indicate a purpose to let state regulation be imposed on the federal regime. ..." (Emphasis added)

In *Head v. New Mexico Board of Examiners,* 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963), appellants, newspaper owners and a radio corporation, had been enjoined from accepting for publishing within the State of New Mexico a Texas optometrist's advertisement found to be in violation of New Mexico law. It was claimed by appellant-radio corporation that regulation of advertising by radio had been pre-empted by the Communications Act of 1934. In overruling this contention this Court stated at page 431, 83 S. Ct. at page 1764:

> "The nature of the regulatory power given to the federal agency convinces us that Congress could not have intended its grant of authority to supplant all the detailed state regulation of professional advertising practices, particularly when the grant of power to the Commission was accompanied by no substantive standard other than the 'public interest, convenience, and necessity.'"

See also on this same principle *Brotherhood of Locomotive Engineers et al. v. Chicago, Rock Island & Pacific Railroad Co.,* 382 U.S. 423, 15 L. Ed. 2d 501, 86 S. Ct. 594 (1966); *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963); *Allen-Bradley, Local 1111 v. Wisconsin*

Employment Relations Board, 1942, 315 U.S. 780, 86 L. Ed. 1154, 62 S. Ct. 820 (1941); *Missouri Pacific Railroad Co. v. Norwood,* 283 U.S. 249, 75 L. Ed. 1010, 51 S. Ct. 458, (1930); *Reid v. Colorado,* 187 U.S. 137, 47 L. Ed. 108, 23 S. Ct. 92 (1902); *California v. Zook,* 336 U.S. 725, 93 L. Ed. 1005, 69 S. Ct. 841 (1949).

The Federal Trade Commission in its brief to the District Court and during oral argument clearly stated that it does not consider the Texas law invalidated by any action on the part of the Commission and there exists no intent to pre-empt state law in this area. It is respectfully submitted that the manifested intention of the Commission to limit its authority and allow the Texas regulation to be imposed in the same field, precludes any question that Article 1106(b) has been pre-empted.

We respectfully submit that the argument and authorities cited above conclusively establishes the principle that the mere entrance into the field by the federal authority will not result in a displacement of an otherwise valid state regulation in the absence of a conflict in the two regulatory schemes or unless the intent to pre-empt the field has been clearly manifested by the Federal Government. Unquestionably, in the instant case, there is no conflict between Article 1106 (b) and the Federal Trade Commission requirements. Nor has there been any intent on the part of Congress or the Federal Trade Commission to pre-empt state law, rather the Federal Trade Commission has clearly evidenced it is their intention that the Texas law has not been pre-empted by any action on their part. Therefore, it is established beyond preventure that the Appellant's contention on this point is clearly too in-

substantial to warrant further argument before this Court as the decisions of this Court have foreclosed any doubt as to the validity of the District Court's Judgment.

II.

THE CONTENTION THAT THE TEXAS LAW CONSTITUTES AN UNDUE BURDEN ON COMMERCE IS TOO INSUBSTANTIAL TO SUPPORT JURISDICTION OF A DIRECT APPEAL TO THIS COURT OR WARRANT FURTHER ARGUMENT BEFORE THIS COURT.

Due to the fact that the lack of substantiality of the Appellant's contention bears on both the requirements of a three-judge court and, in the alternative, whether further argument before the Honorable Court is warranted, for purposes of argument the questions will be considered together.

The only other contention alleged by the Appellant to support his cause of action is that the Texas labeling requirement constitutes an undue burden on commerce and consequently, violates the Commerce Clause of the United States Constitution.

It is respectfully submitted that this contention is completely devoid of merit and does not present a substantial Federal question. It has long been held by this Court that a three-judge court is not called for when the alleged constitutional claim is insubstantial, *Swift & Co., Inc. v. Wickham,* 382 U.S. 111 (supra), *Ex parte Poresky,* 290 U.S. 30, 78 L. Ed. 152, 54 S. Ct. 3; *California Water Service Company v. City of Redding,* 304 U.S. 252, 82 L. Ed. 1323, 58 S. Ct. 865.

It is a well established principle, enunciated in many decisions of this Court, that States in the exercise of their police powers, may regulate matters in interstate commerce as long as the regulation does not discriminate against foreign commerce, conflict with Federal law, operate in an area pre-empted by federal law or impose an undue burden or restraint on interstate commerce.

In *Head v. New Mexico Board of Examiners,* 374 U.S. 424, (supra), this Court in holding that the New Mexico statute did not constitute an undue burden on interstate commerce stated, beginning on page 427:

> "Without doubt, the appellants' radio station and newspaper are engaged in interstate commerce, and the injunction in this case has unquestionably imposed some restraint upon that commerce. But these facts alone do not add up to an unconstitutional burden on interstate commerce. As we said in Huron Portland Cement Co. v. City of Detroit, 362 US 440, 4 L ed 2d 852, 80 S Ct 813, 78 ALR 2d 1294, upholding the application of a Detroit smoke abatement ordinance to ships engaged in interstate and international commerce: 'In determining whether the state has imposed an undue burden on interstate commerce, it must be borne in mind that the Constitution when "conferring upon Congress the regulations of commerce, . . . never intended to cut the States off from legislating on all subjects relating to the health, life, and all safety of their citizens, though the legislation might indirectly affect the commerce of the country. Legislation, in a great variety of ways, may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."' (Citations Omitted.)"

See also *Florida Lime and Avocado Growers, Inc. v. Paul,* 373 U.S. 132 (supra); *California v. Zook,* 336 U.S. 725, (supra).

This Court has consistently held that State labeling and inspection laws, in the absence of discrimination against foreign commerce, do not impose an undue burden or restraint on commerce and constitute a legitimate exercise of the State's police power.

In *Savage v. Jones,* 225 U.S. 501, 32 S. Ct. 715, 56 L. Ed. 1182 (1912), there was involved the validity of an Indiana statute regulating the sale of concentrated commercial feeds for animals and providing for affixing of labels and stamps on the packages as evidence of the guarantee and inspection thereof. In holding that the Act did not constitute an unwarranted interference with interstate commerce, this Court stated on page 524, 32 S. Ct. on page 722:

> "The evident purpose of the statute is to prevent fraud and imposition in the sale of food for domestic animals,—a matter of great importance to the people of the state. Its requirements were directed to that end, and they were not unreasonable. It was not aimed at interstate commerce, but, without discrimination, sought to promote fair dealing in the described articles of food . . . when the local police regulation has real relation to the suitable protection of the people of the state, and is reasonable in its requirements, it is not invalid because it may incidentally affect interstate commerce, provided it does not conflict with legislation enacted by Congress pursuant to its constitutional authority."

The principle enunciated in *Savage v. Jones,* 225 U.S. 501, (supra), has been quoted with approval and

reaffirmed by this Court in several later cases involving similar questions. *Standard Stock Food Co. v. Wright,* 225 U.S. 540, 56 L. Ed. 1197, 32 S. Ct. 784 (1911); *Corn Products Refining Co. v. Eddy,* 249 U.S. 427, 63 L. Ed. 689, 39 S. Ct. 325 (1918); see also on this same principle *Plumley v. Massachusetts,* 155 U.S. 461, 39 L. Ed. 223, 15 S. Ct. 154; *Patapsco Guano Co. v. Board of Agriculture,* 171 U.S. 345, 43 L. Ed. 191, 18 S. Ct. 862.

In *Atlantic Refining Company v. Trumbull,* 43 F. 2d 154, (D.C. Conn. 1930), sections of a state statute regulating motor oil labeling were held "clearly justified in order to guard against deception." A California statute that requires labeling of previously used oil was found constitutional in *Paraco, Inc., et al. v. Department of Agriculture, et al.,* 257 P. 2d 981 (1953).

Thus, it is clear from the authorities cited above that state statutes which require proper labeling to prevent deception of the public have been held by this Court and other courts to be a legitimate exercise of the state's police power and do not constitute an undue burden on commerce.

The Appellant has submitted to the Court the unreported Decision of a three-judge Federal Court in *Double-Eagle Lubricants, Inc. v. New Mexico Board of Revenue, Gasoline Tax Division, District of New Mexico,* No. 4549 (August 8, 1961), and states in its jurisdictional statement that this case is "based squarely on the same set of facts as are herein involved."

It is apparent from the decision in this case that the Court was not apprised as to the true facts involved and misconstrued applicable law.

The Court found that the Federal Trade Commission:

> "... required the Plaintiff to label its products in accordance with the Order of the Federal Trade Commission, and that the said Plaintiff placed on the containers in which its ships and sells its products in commerce in accordance with the requirements of the Federal Trade Commission...."

As has been pointed out above, the Appellant was not a party to the original Federal Trade Commission Decision and, before rendition of the New Mexico decision, had been notified that the Federal Trade Commission did not approve of the labels being used by the Appellant.

The Court cites only one decision, *McDermott v. Wisconsin,* 228 U.S. 115, 57 L. Ed. 754, 33 S. Ct. 431 (1931), as authority for its holding that the New Mexico labeling statute constituted an undue burden on commerce. It is clear that the *McDermott* decision is not authority for the proposition for which it is cited. This Court on at least two occasions has reviewed the holding in *McDermott.* In *Corn Products Refining Co. v. Eddy,* 249 U.S. 427, 63 L. Ed. 689, 39 S. Ct. 325 (1918), this Court stated on page 439:

> "It is argued that the present case is controlled rather by McDermott v. Wisconsin, 228 U.S. 115, 130, 57 L.ed. 754, 765, 47 L.R.A. (N.S.) 984, 33 Sup. Ct. Rep. 431, and in effect that this case must be taken as overruling Savage v. Jones. The contention is unfounded. The authority of the earlier decision was expressly recognized in the opinion of the court in the later; the distinction being placed (pp. 131, 132) upon the question whether the regulations of the state concerning

the same subject-matter were in conflict with the acts of Congress. The Wisconsin statute was held to be in conflict because it required that packages of food stuffs received through the channels of interstate commerce, bearing labels intended to be in compliance with the act of Congress, while the goods were still unsold and were in the possession of the importer for the purpose of sale, and being exposed and offered for sale by him, as a condition of their legitimate sale within the state, should bear the label required by the state law, and none other,—in effect requiring the label that showed compliance with the act of Congress to be removed from the package before the first sale by the importer, and while the goods remained still subject to Federal inspection." See also *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148, 86 L.Ed. 754, 62 S. Ct. 491 (1941).

Due to the New Mexico court's unawareness of the applicable facts, coupled with its erroneous application of prevailing principles, we submit that the case is not authority for the propositions relied on by the Appellant.

In applying the controlling principles of the authorities cited above, it is clear that the Texas law is not repugnant to the Constitution or laws of the United States. Article 1106(b) clearly does not discriminate against the Appellant as it applies equally to all motor oil of this nature sold in Texas and it does not impose any additional burden on products originating in interstate commerce. Conclusively, as pointed out above, the State law does not conflict with the Federal law nor has the field been pre-empted by the Federal Government. Neither does the State law impose any unreasonable or undue burden on interstate commerce. The

provisions of this statute merely require that the product be labeled in a reasonable manner to truthfully advise the public of the nature and quality of its contents.

Therefore, it is respectfully submitted that due to no evidence being introduced by the Appellant to support its contention that the State law is unconstitutional or imposes an undue burden on commerce, and contrary to the statement by the Appellant on page 5 of its Jurisdictional Statement, as the record clearly reflects, no evidence was introduced which shows "the cans must be ordered for in advance in order that they be properly processed and lithographed, and that the labels cannot be changed after the can is manufactured." Coupled with the failure of the Appellant by pleading and proof to overcome the strong presumption in favor of the constitutionality of the Texas statute and the clear showing above that the State statute is a legitimate exercise of the police power of this State and a reasonable and nonburdensome regulation on commerce, the Appellant's allegation that the Texas statute is unconstitutional is clearly without merit and is too insubstantial to support the jurisdiction of a three-judge court or, in the alternative, warrant further argument before this Court.

CONCLUSION

We respectfully submit, based on the argument and authorities cited above, that this Court does not have jurisdiction of the Appellant's direct appeal from the decision of the United States District Court and that the Appellant's appeal should be dismissed for lack of jurisdiction. In the alternative, should this Court

find that the Three-Judge District Court did have jurisdiction of the Appellant's Complaint, it is respectfully submitted that the Appellant presents no substantial question for decision of this Court and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

WAGGONER CARR
Attorney General of Texas

HAWTHORNE PHILLIPS
First Assistant Attorney General
of Texas

T. B. WRIGHT
Executive Assistant Attorney General

HOWARD M. FENDER
Assistant Attorney General

LONNY F. ZWIENER
Assistant Attorney General

ROBERT W. NORRIS
Assistant Attorney General
Attorneys for Appellee

The State of Texas
Box R, Capitol Station
Austin, Texas 78711

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion to Dismiss and/or Affirm were served upon John B. Ogden, Attorney for Appellant, Suite 1408-9 Liberty

Bank Building, Oklahoma City 2, Oklahoma; E. K. Elkins, Attorney for Federal Trade Commission, Office of the General Counsel, Washington, D. C.; and Alex Bickley, Attorney for City of Dallas, Dallas, Texas, by depositing same in the United States Mail, properly addressed, postage paid, certified mail, on this the 29th day of April, 1966.

ROBERT W. NORRIS
Assistant Attorney General

APPENDIX A

Article 1106(b), Vernon's Penal Code:

"(b) No person, firm, association of persons or corporation shall sell or offer for sale as lubricating oil, any oil that has been rerun, refiltered, reclaimed or refined from crank case draining or any other oil that has been theretofore used for purposes of lubrication, unless the said oil is sold as and labeled 'Reconditioned Motor Oil.' The words 'Reconditioned Motor Oil' shall be plainly and legibly printed on each container, which said lettering shall be imprinted on two (2) places on the container or label in a manner that said lettering will appear both on the front and back surface of the container when displayed to the public in sale displays, and which said lettering shall be in letters of not less than three-sixteenths (3/16) of an inch in height and not less than one-sixteenth (1/16) of an inch in width of each line used to form said letters."

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JOHN F. DAVIS, CLERK

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 1177

DOUBLE EAGLE LUBRICANTS, INC.,
Appellant,

VERSUS

THE STATE OF TEXAS,
Appellee.

PETITION FOR REHEARING

JOHN B. OGDEN
1408-9 Liberty Bank Building
Oklahoma City, Oklahoma

Attorney for Appellant,
Double Eagle Lubricants, Inc.

June, 1966

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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AUTHORITIES

Cases:

Swift and Company, Inc. v. Wickham, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 — 1

Statutes:

28 U.S.C., Sec. 1253 — 1

Vernon's Penal Code, Art. 1106(b) — 1

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Appellee.

PETITION FOR REHEARING

Comes now the appellant, Double Eagle Lubricants, Inc., and shows to the Court that this Court dismissed the appeal in this cause.

Both the appellant and the appellee believed that a three-judge court should be convened pursuant to 28 U.S.C., Sec. 2281. The court was convened and thereafter this Court rendered its opinion in *Swift and Company, Inc.* v. *Wickham,* 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194. Whether or not the Court has jurisdiction of the appellant's direct appeal, under 28 U.S.C., Sec. 1253, depends on the issues involved, and whether the three-judge court was required to hear and determine the appellant's action to enjoin the enforcement of Article No. 1106(b), Vernon's Penal Code. The appellant believed that it should not be

prosecuted criminally under the Texas Law by reason of the fact that it was engaged in Interstate Commerce, which was admitted and, therefore, it was protected under the Commerce Clause of the United States and by reason of the further fact that the labeling of this motor oil was required by the Federal Trade Commission and, therefore, the Federal Government had preempted the labeling of motor oil shipped in Interstate Commerce, and by virtue of the facts, the law and the constitutional questions involved, this case should have been presented to a three-judge court, as was done in New Mexico, involving this appellant and the State of New Mexico.

The appellant now shows that in presenting the appeal, it did so in good faith, believing that it had this right under the law.

The appellant, therefore, shows that it would be unjust to deny to this appellant the right of appeal and subject it to the penal laws of the State of Texas.

The appellant, therefore, shows to this Honorable Court that since it believed that this Court had jusidiction and had acted in good faith, that this Court should now grant a rehearing in this cause and direct the District Court of the Northern District of Texas to vacate its judgment and re-enter the same, so that the right of the appellant to present its appeal to the United States Court of Appeals of the Fifth Circuit will not be denied, and that it will have full opportunity thereby to be heard.

This appellant further shows that if the appeal had been lodged in the United States Court of Appeals for the Fifth Circuit and had it been held improper, then the Court

of Appeals would have been powerless to grant any relief to the appellant.

This appellant, therefore, most respectfully petitions and requests this Honorable Court to either grant a rehearing in this cause or to direct the District Court to reenter its judgment, in order that the appellant may appeal to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

JOHN B. OGDEN
1408-9 Liberty Bank Building
Oklahoma City, Oklahoma

Attorney for Appellant,
Double Eagle Lubricants, Inc.

June, 1966

CERTIFICATE OF SERVICE

I do hereby certify that a copy of the foregoing Petition for Rehearing has been served upon the Appellee by depositing same in the United States Mail on the _____ day of June, 1966, addressed to the Honorable Waggoner Carr, Attorney General of Texas, Austin, Texas.

JOHN B. OGDEN

CERTIFICATE OF COUNSEL

I hereby certify that this Petition for a Rehearing is presented in good faith and not for delay, and in order that substantial justice may be due, and it is presented in accordance with Rule No. 58.

JOHN B. OGDEN

END